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Supreme Court, U.S.
FILED

(1) 061331 APR 02 2007

No. ____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

GERKE EXCAVATING, INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May the lower courts prohibit the United States Army Corps of Engineers from relying on the plurality opinion in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), to determine federal jurisdiction over wetlands under the Clean Water Act.

LIST OF ALL PARTIES

Petitioner: Gerke Excavating, Incorporated

Respondents: United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner Gerke Excavating, Incorporated, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gerke Excavating, Inc. (Gerke), respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The challenged remand order of the Court of Appeals for the Seventh Circuit is reported as *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), and is attached as Appendix (App.) A.

JURISDICTION

The remand order of the Court of Appeals for the Seventh Circuit was entered on September 22, 2006. That court's denial of the Petition for Rehearing and Suggestion for Rehearing *En Banc* was entered on December 1, 2006. App. B. On February 12, 2007, this Court granted an extension of time in which to file this petition for writ of certiorari to and including April 2, 2007. App. C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

The Clean Water Act (CWA) provides in pertinent part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill materials into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a)).

> (5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.
>
> (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . .
>
> (7) The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(5)-(7) (CWA § 502(5)-(7)).

Federal regulations define "waters of the United States" to mean:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie

potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R § 328.3(a) (2005).

Federal regulations define "adjacent" as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c).

INTRODUCTION

In *Rapanos v. United States*, 126 S. Ct. 2208 (2006), a five Justice majority of this Court overruled the Sixth Circuit determination that federal jurisdiction under the Clean Water

Act extended to inland wetlands solely because they were connected to down stream navigable waters. But this Court split on the basis for federal wetland jurisdiction. A single Justice, concurring in the result, interpreted the Clean Water Act broadly so as to reach any wetland with an undefined "significant nexus" with navigable-in-fact waters, whereas a four Justice plurality interpreted the Clean Water Act more narrowly, concluding the Act only covered traditional rivers, lakes, and streams connected to navigable-in-fact waters, and those wetlands indistinguishable from these covered waters.

Subsequently, this Court granted certiorari in this case, vacated the Seventh Circuit decision, and remanded the case in light of *Rapanos*. On remand, the Seventh Circuit determined the lone concurrence in *Rapanos* was controlling and that federal jurisdiction under the Clean Water Act *must be based* on the "significant nexus" standard thereby prohibiting the Corps of Engineers from relying on the *Rapanos* plurality on remand.

However, the First Circuit expressly rejected the Seventh Circuit's reading of *Rapanos* in this case establishing a clear conflict between the circuits. In *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), the First Circuit held that Clean Water Act jurisdiction could be established in reliance on *either* the plurality standard *or* the "significant nexus" standard. Moreover, the First and Seventh Circuit rulings conflict with this Court's decision in *Marks v. United States*, 430 U.S. 188, 193 (1977), wherein this Court declared that in fragmented decisions " 'the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments on the narrowest grounds.*' " Indeed, there is general disagreement among the Circuits as to whether and how *Marks* applies to this Court's split decisions.

Under a literal reading of *Marks*, the "narrowest grounds" in *Rapanos* is the plurality opinion. When Clean Water Act jurisdiction is established under the plurality standard, all five

Justices who concurred in the judgments would agree on the outcome. However, when jurisdiction is established under the undefined "significant nexus" standard, only one Justice who concurred in the judgments would support the outcome. Therefore, the plurality opinion is the "narrowest grounds" and the controlling opinion in *Rapanos*.

Also, because the jurisdictional boundaries established by the plurality opinion are more readily discernible than with the "significant nexus" standard, the plurality standard is the only viable standard for securing the constitutional safeguards of fairness and predictability.

STATEMENT OF THE CASE

The subject wetlands are located on an undeveloped 5.8-acre tract of land in Tomah, Wisconsin, that the owner wished to develop. *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 805 (7th Cir. 2005). The wetlands are drained by a ditch that runs into a nonnavigable creek that flows into the Lemonweir River, also nonnavigable. *Id.* The Lemonweir runs to the Wisconsin River, a navigable waterway, which empties into the Mississippi River. *Id.*

At the direction of the owner, Gerke Excavating, Inc., removed stumps and topsoil and filled in and graded part of the property using a bulldozer and trucks. *Id.* Subsequently Gerke was charged with filling wetlands without a federal permit under the Clean Water Act and fined $55,000. *Id.* In defense, Gerke argued that the wetlands did not qualify as "waters of the United States" within the meaning of the Clean Water Act. *Id.* at 806. The district court granted summary judgment to the United States on the issue of federal jurisdiction. *Id.* at 805. On appeal, the Seventh Circuit affirmed finding a hydrological connection between the subject wetlands and down stream

navigable waters was a sufficient jurisdictional basis for federal regulation of the subject wetlands. *Id.* at 807-808.

After the Seventh Circuit decision, this Court decided *Rapanos*. A five-justice majority in *Rapanos* adjudged that something more than a "hydrological connection" between a wetland and a traditional navigable water was required to establish federal jurisdiction under the Clean Water Act. But, no single rationale garnered a majority vote. Four Justices, forming a plurality on the Court, determined the Act required limiting federal authority to those "relatively permanent, standing or continuously flowing bodies of water" traditionally recognized as "streams[,] . . . oceans, rivers [and] lakes" that are connected to traditional (or navigable-in-fact) waters. *Rapanos*, 126 S. Ct. at 2225 (Scalia, J.). The plurality would also authorize federal regulation of wetlands abutting these water bodies, but *only if* they contain a continuous surface water connection such that the wetland and the covered water are "indistinguishable." *Id.* at 2234. Ephemeral and insubstantial connections would not suffice. *Id.* at 2225.

Justice Kennedy concurred in the judgment but proposed a broad and undefined "significant nexus" test for determining federal Clean Water Act jurisdiction. *Id.* at 2236 (Kennedy, J., concurring in the result). Under this test, any wetland would be subject to federal regulation if it is deemed to "significantly affect" a traditional navigable waterway. *Id.* at 2248.

The four Justices in the dissent supported the government's view that the agencies could choose to regulate essentially any water body to advance the statutory goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters," *id.* at 2252, *et seq.* (Stevens J., dissenting), but added that they would uphold federal jurisdiction in any case "in which either the plurality's or Justice Kennedy's test is satisfied. . . ." *Id.* at 2265.

Based on that ruling, this Court granted a writ of certiorari in this case, vacated the Seventh Circuit judgment, and remanded the case in light of *Rapanos*. On remand, the Seventh Circuit acknowledged this Court's interpretative rule for split decisions as set out in *Marks* and concluded Justice Kennedy's opinion was decided on the "narrowest grounds" and, therefore, controlling. App. at A-3. The Seventh Circuit reasoned that Justice Kennedy's "significant nexus" test was "narrower" than the plurality test for wetland jurisdiction because Justice Kennedy's approach is less restrictive of federal authority. *Id.* The Seventh Circuit thus concluded the "significant nexus" standard "must govern the further stages of this litigation." App. at A-4.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In *Rapanos v. United States*, 126 S. Ct. 2208, all factions on this Court lamented the lack of certainty that prevails with respect to federal authority under the Clean Water Act. As Justice Scalia noted in the plurality opinion, the "burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States' is not trivial." *Id.* at 2214. "The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Id.* The Corps of Engineers processes over 85,000 wetland permit applications each year, and the number is growing. *See Conserving America's Wetlands 2006: Two Years of Progress Implementing the President's Goal*, Council on Environmental Quality, 22 (2006). More than $1.7 billion is spent annually by private and public applicants to obtain wetland permits. *Rapanos*, 126 S. Ct. at 2214.

Of equal importance, "[t]hese costs cannot be avoided, because the Clean Water Act 'impose[s] criminal liability,' as well as steep civil fines, 'on a broad range of ordinary industrial and commercial activities.'" *Id.* "In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over 'waters of the United States' to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 states." *Id.* at 2215.

Regrettably, this Court was unable to provide the needed certainty in defining the reach of federal authority under the Clean Water Act in *Rapanos*. Instead, this Court produced a split decision with no clear controlling opinion or jurisdictional rationale to guide either public enforcers or private citizens. But the lower courts have exacerbated an already untenable situation by adopting conflicting interpretations of this Court's *Rapanos* decision. More than ever, this Court's intervention is required to set the limits of federal authority under the Clean Water Act. It is not enough to defer this matter to Congress for additional legislation or to the implementing agencies for additional regulation. It would not be prudent for them to act in the face of the current Circuit Court split with competing jurisdictional standards. Therefore, this Court should grant the writ and resolve the conflict.

I

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER FEDERAL JURISDICTION OVER WETLANDS UNDER THE CLEAN WATER ACT *MUST* BE BASED ON A LONE CONCURRENCE IN *RAPANOS*

In *United States v. Johnson*, 467 F.3d 56, the First Circuit expressly rejected the conclusion of the Seventh Circuit in this

case that Justice Kennedy's "significant nexus" standard in *Rapanos* is the "narrowest grounds" and the controlling opinion under *Marks v. United States*, 430 U.S. 188.

In *Marks*, this Court stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments on the narrowest grounds.*'" 430 U.S. at 193 (emphasis added). This test has been recognized as the *only* approach sanctioned by this Court for interpreting its split decisions. *In re Michael Francis Cook*, 322 B.R. 336, 341 (N.D. Ohio 2005) ("The only approach approved by the Supreme Court is the 'narrowest grounds' approach.").

The language of *Marks* was not unique to that case. It derived from this Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976). In *Gregg*, this Court examined *Furman v. Georgia*, 408 U.S. 238 (1972), which involved a challenge to the constitutionality of a Georgia death penalty statute. In *Furman*, as in *Rapanos*, five Justices agreed in the judgments, but the Court was split on the legal standard that should be applied to death penalty cases. Two Justices who concurred in the judgments felt that capital punishment was unconstitutional in all cases whereas the other three Justices believed that capital punishment was unconstitutional only in the circumstances presented in that case. Thus in *Gregg*, this Court held: "Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." 428 U.S. at 169 n.15.

The Seventh Circuit putatively relied on this interpretive rule in this case, but it changed the wording, and therefore the

test. In its opinion below, the court cited *Marks* for the proposition that

> [w]hen a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose. In *Rapanos*, that is Justice Kennedy's ground.

App. at A-2-3.

This adulterated version of the *Marks* rule allowed the Seventh Circuit in this case to aggregate the four dissenters in *Rapanos* with Justice Kennedy to find five Justices that would support Justice Kennedy's "significant nexus" standard for establishing federal jurisdiction over wetlands under the Clean Water Act. However, the court ignored the more persuasive argument that when the plurality standard is applied to find federal jurisdiction, the result would have the support of all nine Justices. But under *Marks*, finding the support of five Justices is not the test, especially in a case like *Rapanos* where five or more Justices would support more than one opinion. Rather, under *Marks*, lower-court judges are to look at the "narrowest grounds."

The First Circuit in *Johnson* found it curious that the Seventh Circuit in this case equated "narrowest grounds" with the opinion "least restrictive of federal authority." *Johnson*, 467 F.3d at 61. Although the cases on which *Marks* relied involved situations in which the "narrowest grounds" was the least restrictive of federal jurisdiction, the *Johnson* court observed that this was mere coincidence and that it "does not necessarily mean that the Supreme Court in *Marks* equated the 'narrowest grounds' of decision in a case with fragmented decisions to the grounds least restrictive of the assertion of federal authority." *Id.* at 63. "Such an equation," the court stated, "leaves unanswered the question of how one would

determine which opinion is controlling in a case where the government is not a party." *Id.* Given the constitutional issue raised, the court found it "just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality)," because, the court concluded, "that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *Id.*

In contrast to the Seventh Circuit's reading of *Marks* in this case, the First Circuit offered an alternative. The court opined that the "narrowest grounds" might sensibly be interpreted to mean the "less far-reaching-common ground," *id.* (citing *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234, 1247 (11th Cir. 2001)), or the opinion "most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases," (citing Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419, 420-21 (1992)). *Johnson*, 467 F.3d at 63.

Relying on *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991), the *Johnson* court noted the D.C. Circuit found "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *Johnson*, 467 F.3d at 63-64. "In other words," the First Circuit explained, "the 'narrowest grounds' approach makes the most sense when two opinions reach the same result in a given case, but one opinion reaches that result for less sweeping reasons than the other." *Id.* at 64. According to *Johnson*, *Marks* followed this approach. In *Marks* this Court examined *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts*, 383 U.S. 413 (1966), in which a majority of this Court held that a lower court incorrectly concluded a book was obscene and did not have First Amendment protection. Three Justices decided that only

non-obscene materials should receive First Amendment protection while two other Justices concluded that the First Amendment provided an absolute shield against government action. As a logical subset of the other, this Court concluded in *Marks* that the former opinion, providing non-obscene materials First Amendment protections, was the "narrowest grounds" for the judgment and the controlling opinion in the case.

Put another way:

> The Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule. That is, if a statute is found to be constitutionally permissible pursuant to a strict scrutiny standard of review, then it is necessarily permissible pursuant to a rational basis standard of review. From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same.

Ken Kimura, Note, *A Legitimacy Model For The Interpretation Of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-1604 (1992).

In *Johnson*, the court noted that the Kennedy "significant nexus" standard in *Rapanos* is not a "logical subset" of the plurality standard for federal jurisdiction over wetlands: "The cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction."[1] *Johnson*, 467 F.3d at 64.

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[1] Remarkably, however, the First Circuit failed to consider the obvious possibility that the plurality standard in *Rapanos* is a "logical subset" of the Kennedy standard. It is apparent that the plurality test is comparable to the narrower strict scrutiny standard,

(continued...)

For this reason, the First Circuit rejected the Seventh Circuit's conclusion in this case that under *Marks* Justice Kennedy's lone concurrence is controlling in *Rapanos*. Instead, the First Circuit held that "*Marks* does not translate easily to the present situation," *id.* at 64, and that the "federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." *Id.* at 66. This conflict creates a substantial disparity between these Circuits in the enforcement of the Clean Water Act which requires reconciliation by this Court.[2]

II

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER *MARKS* APPLIES TO THIS COURT'S SPLIT DECISIONS SUCH AS *RAPANOS*

The *Johnson* court points out that a number of Circuits have abandoned this Court's *Marks* approach to split opinions

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[1] (...continued)
mentioned in the analogy above, whereas the Kennedy "significant nexus" test is comparable to the broader rational basis standard. As Justice Stevens observed, Justice Kennedy's approach "treats more of the Nation's waters as within the Corps' jurisdiction" and it would be an "unlikely event that the plurality's test is met but Justice Kennedy's is not." *Rapanos*, 126 S. Ct. at 2265 n.14 (Stevens, J., dissenting).

[2] In addition to the Seventh Circuit in this case, the Ninth Circuit has also concluded, without explanation, that Justice Kennedy's "significant nexus" standard is controlling in *Rapanos* under the *Marks* rule thus creating an additional conflict among the Circuits. *See Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) (currently on petition for rehearing).

or applied *Marks* selectively. Instead, they have sought to divine the controlling opinion in this Court's fragmented decisions, like *Rapanos*, by adopting a "pragmatic" approach to the situation. This approach involves assessing which grounds would "command a majority of the Court." *Johnson*, 467 F.3d at 64. In *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992), for example, the court concluded: "In essence, what we must do is find common ground shared by five or more justices." *See also United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) ("We need not find a legal opinion which a majority joined, but merely 'a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.' "

The courts that have adopted this approach are not particular as to the Justices that may be joined in a "majority." In contrast to the directive in *Marks,* that the controlling opinion must be found among those Justices who concurred in the judgments, some Circuits give equal weight to the dissenting Justices. The Seventh Circuit in this case, which purported to apply *Marks*, relied on the fact that "any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters)." App. at A-4. The *Johnson* court used similar logic to justify its determination that federal jurisdiction over wetlands could be established under either the plurality standard in *Rapanos* or the Kennedy standard:

> If Justice Kennedy's test is satisfied, then at least Justice Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is satisfied, then at least the four plurality members plus the four dissenters would support jurisdiction.

Johnson, 467 F.3d at 64.

In *Student Public Interest Research Group of New Jersey, Inc. v. AT & T Bell Labs*, 842 F.2d 1436 (3d Cir. 1988), the Third Circuit examined *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), to determine the controlling opinion. In *Pennsylvania*, this Court was asked to address the availability of contingency fees under federal fee-shifting statutes. This Court split along the lines of *Rapanos* with four Justices in the plurality, four Justices in the dissent, and Justice O'Connor's lone concurrence in the judgments. The Third Circuit determined that "[b]ecause the four dissenters would allow contingency multipliers in all cases in which Justice O'Connor would allow them, her position commands a majority of the Court" and is controlling. *Student*, 842 F.2d at 1451.

In *King v. Palmer*, *supra*, the D.C. Circuit took a different approach. According to *Johnson*, the D.C. Circuit "refused to examine the points of commonality among Justice O'Connor's opinion and that of the dissent, relying mainly on a literal reading of *Marks's* [sic] language that the holding is the position of the Justices '*who concurred in the judgments* on the narrowest grounds.' " *Johnson*, 467 F.3d at 65. The D.C. Circuit relied as well on the fact that this Court "had not explicitly applied *Marks* to situations where concurring and dissenting votes would be combined." *Id.*

This widespread circuit conflict has not gone unnoticed by this Court. This Court has remarked on how the *Mark's* inquiry has "so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 745-746 (1994). It is time, therefore, for this Court to address this conflict in the context of this case.

III

THIS COURT SHOULD GRANT THE WRIT OF CERTIORARI BECAUSE THE UNDEFINED "SIGNIFICANT NEXUS" STANDARD IMPOSED BY THE COURT BELOW RAISES DUE PROCESS CONCERNS

In more than 30 years, the Corps and EPA have failed to follow a consistent jurisdictional test under the Clean Water Act. A report from the General Accounting Office confirms that the Army Corps of Engineers' local districts "differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices In Determining Jurisdiction* 3 (Feb. 2004), *available at* http://www.gao.gov/new.items/ d04297.pdf (last visited Feb. 15, 2007) (GAO Report).

In addition to the inter-district inconsistences, the GAO Report concludes that even Corps staff working in the same office cannot agree on the scope of the Clean Water Act and that "three different district staff" would likely make "three different assessments" as to whether a particular water feature is subject to the Clean Water Act. GAO Report at 22. This is more than a theoretical concern. This degree of uncertainty permeates the enforcement decisions of the Corps. In *Rapanos*, those decisions became the basis for multimillion dollar fines and criminal prosecution. And, in this case, Gerke was fined $55,000 for filling inland wetlands without a federal permit.

The right of the people to know when they have violated the law is deserving of greater safeguard than the convenience of the enforcing agency. But the scope of federal jurisdiction under the Clean Water Act is beyond the comprehension of ordinary people. The very definition of "wetlands" defies common sense. Federal regulations define "wetlands" as those

areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). Under this definition, an area need be wet only "for one to two weeks per year" to qualify as a "wetland." Gordon M. Brown, Comment, *Regulatory Takings and Wetlands: Comments on Public Benefits and Landowner Cost*, 21 Ohio N.U. L. Rev. 527, 529 (1994). In other words, a "wetland" may be mostly dry land.[3]

No reasonable person would conclude that mostly dry land is subject to federal control as a jurisdictional wetland. Ocie Mills and his son found this out the hard way. These two were convicted for filling "wetlands" on their property without a permit—an act a district court characterized as the innocuous placing of clean fill on dry land:

> This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice in Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of "discharging pollutants into the navigable waters of the United States."

United States v. Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993).

---

[3] The definition of "discharge" also defies common sense. The Corps interprets that term to mean the mere movement of dirt in situ. *See Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001).

For this offense, Mills and his son served 21 months in prison, one year in supervised release, paid $5,000 in fines, and were required to restore the site to its original condition. *Id.*

This Court has long held that "before a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute." *United States v. Gradwell*, 243 U.S. 476, 485 (1917). *See also United States v. Lanier*, 520 U.S. 259, 267 (1997). But the "significant nexus" test provides no such clarity. To the contrary, as the *Rapanos* plurality points out, "Justice Kennedy's 'significant nexus' standard is perfectly opaque. When, exactly, does a wetland 'significantly affect' covered waters, and when are its effects 'in contrast . . . speculative or insubstantial?'" *Rapanos*, 126 S. Ct. at 2235 n.15.

Similar questions were raised by the district court in *United States v. Chevron Pipe Line Company*, 437 F. Supp. 2d 605, 613 (N.D. Texas 2006), the first case to apply the *Rapanos* decision. That case involved an accidental discharge of oil into a dry, unnamed drainage ditch that flowed only during significant storm events. *Id.* at 607. Although the oil was cleaned up before it reached any water, as required by state law, and the nearest navigable-in-fact waterway was connected to the ditch by intermittent streams scores of miles away, the Corps of Engineers sought fines from the company for discharging into "navigable waters" without a federal permit. *Id.* at 607-608. Therefore, the court looked to *Rapanos* for guidance in determining the scope of federal jurisdiction.

The court was quick to dismiss the Kennedy approach as an unworkable standard. The court observed that Justice Kennedy "advanced an ambiguous test—whether a 'significant nexus' exists to waters that are/were/might be navigable." *Id.* at 613. According to the court, "[t]his test leaves no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is "significant' and how is a 'nexus' determined?"

Id. at 613 (citations omitted). Therefore, instead of relying on the Kennedy opinion, the court based its decision on existing Fifth Circuit precedent and "the Supreme Court's plurality opinion in *Rapanos v. United States*" and concluded there was no federal jurisdiction. *Id.* at 614. That decision underscores the real world difficulties that are created for the enforcing agencies and the trial courts when this Court does not provide clear limits on federal authority.

Thus, the "significant nexus" standard imposed by the court in this case, and offered alternatively in *Johnson,* is sure to result in inconsistent and unpredictable applications of the law. Only the plurality test, with its clearer lines of demarcation, is likely to provide agency officials and the regulated public with consistent and predictable jurisdictional rules. As the dissent in *Johnson* observed, the "significant nexus" approach "leaves the door open to continued federal overreach" while the plurality's restriction on federal jurisdiction "strikes a constitutional balance" between federal power and individual rights. *Johnson*, 467 F.3d at 66-67 (Torruella, Circuit Judge, dissenting).

CONCLUSION

The Seventh Circuit decision in this case directly conflicts with a decision of the First Circuit and prohibits the Corps of Engineers from relying on the plurality opinion in *Rapanos* that, when applied to find federal jurisdiction over inland wetlands, would have the support of all nine Justices on this Court. Additionally, the circuits are split on the application of *Mark's* generally. These conflicts require resolution by this Court. Inaction by this Court will result in continuing uncertainty as to

Clean Water Act jurisdiction and undermine the Constitution's safeguards against arbitrary enforcement of the law.

DATED: April, 2007.

Respectfully submitted,

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Counsel for Petitioner

Appendix A-1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 04-3941

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GERKE EXCAVATING, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 03-C-0074-C–**Barbara B. Crabb**, *Chief Judge.*

On Remand From the
Supreme Court of the United States

SEPTEMBER 22, 2006

Before POSNER, EASTERBROOK, and EVANS, *Circuit Judges.*

PER CURIAM. This suit charges that the defendant, Gerke Excavating, violated the Clean Water Act by discharging pollutants into "navigable waters" from "point sources" without having obtained the permit from the Corps of Engineers that is required if the pollutant consists of dredge or fill material. 33 U.S.C. §§ 1311(a), 1362(12). The district judge granted

summary judgment for the government and imposed a civil penalty. We affirmed. 412 F.3d 804 (7th Cir. 2005). Gerke filed a petition for certiorari. The Court granted the petition, 126 S. Ct. 2964 (2006), and remanded the case to us for further consideration in light of *Rapanos v. United States*, 126 S. Ct. 2208 (2006), where the Court reversed two judgments by the Sixth Circuit upholding federal authority over wetlands, as had we.

There was, however, no majority opinion in *Rapanos*. Four Justices, in an opinion supporting reversal, wanted to limit federal authority over "navigable waters" to "those wet-lands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [Clean Water Act]. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' . . . thus lack the necessary connection to covered waters that we described as a 'significant nexus.' Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 1226-27 (citations omitted).

Justice Kennedy concurred in the judgment to reverse but not in the plurality opinion. The four dissenting Justices took a much broader view of federal authority; Justice Kennedy criticized them as well as criticizing the plurality.

When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome,

lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose. *Marks v. United States*, 430 U.S. 188, 193 (1977). In *Rapanos*, that is Justice Kennedy's ground.

The plurality Justices thought that Justice Kennedy's ground for reversing was narrower than their own, because they concluded their extensive and in places harsh criticism of the concurrence by saying that "Justice KENNEDY tips a wink at the agency [i.e., the Corps of Engineers], inviting it to try its same expansive reading again." 126 S. Ct. at 2234 n.15. Justice Kennedy expressly rejected two "limitations" imposed by the plurality on federal authority over wetlands under the Clean Water Act, one being the requirement of a "continuous surface connection" between the wetland and the conventional waterway that it abuts. *Id.* at 2242 (concurring opinion). He accused the majority of being "unduly dismissive of the interests asserted by the United States in these cases. Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular." *Id.* at 2246.

The test he proposed is that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* at 2248. This test is narrower (so far as reining in federal authority is concerned) than the plurality's in most cases, though not in all because Justice Kennedy also said that "by saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the

statute as far from traditional federal authority as are the waters it deems beyond the statute's reach." *Id.* at 2246.

Thus, any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in *most* cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the *Rapanos* plurality), the exception being a case in which he would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality) because there was a slight surface hydrological connection. The plurality's insistence that the issue of federal authority be governed by strict rules will on occasion align the Justices in the plurality with the *Rapanos* dissenters when the balancing approach of Justice Kennedy favors the landowner. But that will be a rare case, so as a practical matter the Kennedy concurrence is the least common denominator (always, when his view favors federal authority).

Justice Kennedy's proposed standard, which we conclude must govern the further stages of this litigation, requires factfinding not yet undertaken by the district court. We therefore remand the case to that court for such further proceedings as may be necessary to apply the standard.

REMANDED WITH DIRECTIONS.

No. 04-3941

A true Copy:

Teste:

_____

Clerk of the United States Court
of Appeals for the Seventh Circuit

Appendix B-1

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 1, 2006

Before

Hon. Frank H. Easterbrook, *Chief Judge*

Honorable Richard A. Posner, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 04-3941

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GERKE EXCAVATING, INC., *Defendant-Appellant.*	Appeal from the United States District Court for the Western District of Wisconsin. No. 03-C-0074-C Barbara B. Crabb, *Chief Judge.*

ORDER

On September 29, 2006, plaintiff-appellee filed a motion to clarify the opinion of this court dated September 22, 2006. On October 5, 2006, defendant-appellant filed a petition for rehearing with suggestion for rehearing *en banc*, and on November 2, 2006, plaintiff-appellee filed an answer to the petition. All the judges on the original panel have voted to deny the petition, and none of the judges in regular active service has

requested a vote on the petition for rehearing *en banc*. The petition and the motion are therefore **DENIED**.

Appendix C-1

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

February 12, 2007

Mr. M. Reed Hopper
Pacific Legal Foundation
3900 Lennane Drive
Suite 200
Sacramento, CA 95834

Re: Gerke Excavating, Inc.
v. United States
Application No. 06A782

Dear Mr. Hopper:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on February 12, 2007 extended the time to and including April 2, 2007.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Clayton Higgins

Clayton Higgins
Case Analyst

Appendix C-2

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

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Mr. Paul D. Clement
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Room 5614
Washington, DC 20530-0001

Clerk
United States Court of Appeals for the Seventh Circuit
219 S. Dearborn Street, Room 2722
Chicago, IL 60604

(3)

FILED
JUN 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1331

In the Supreme Court of the United States

GERKE EXCAVATING, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the wetlands in this case are "waters of the United States" within the meaning of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 502(7), 86 Stat. 886, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*); 33 U.S.C. 1362(7).

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In the Supreme Court of the United States

No. 06-1331

GERKE EXCAVATING, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 464 F.3d 723. A prior opinion of the court of appeals is reported at 412 F.3d 804.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2006. A petition for rehearing was denied on December 1, 2006 (Pet. App. B1-B2). On February 12, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 2, 2007 (see Pet. App. C1-C2), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a civil enforcement action brought by the United States under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA). The district court held that petitioner's unpermitted discharges into wetlands violated the CWA, 2004 WL 737522 (Apr. 6, 2004), and the court of appeals affirmed, 412 F.3d 804 (2005).

In June 2006, this Court granted petitioner's prior petition for a writ of certiorari, vacated the judgment of the court of appeals, and remanded the case to the court of appeals for further consideration in light of the Court's intervening decision in *Rapanos* v. *United States*, 126 S. Ct. 2208 (2006). 126 S. Ct. 2964. The court of appeals in turn remanded the case to the district court to consider the impact of *Rapanos*. Pet. App. A1-A4. Petitioner now seeks review of the court of appeals' remand order.

1. Congress enacted the CWA "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA) share responsibility for implementing and enforc-

ing Section 404 of the CWA, 33 U.S.C. 1344, which authorizes the issuance of permits for the discharge of dredged or fill material into waters covered by the Act. See, *e.g.*, 33 U.S.C. 1344(a)-(c). The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). Those definitions encompass, inter alia, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "[t]ributaries" of traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands "adjacent" to other covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[1] The Corps regulations define the term "adjacent" to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c).

2. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362(7) and 33 C.F.R. 328.3(a), and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

has been construed expansively to cover waters that are not navigable in the traditional sense."). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001), the Court held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos*, *supra*. *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See 126 S. Ct. at 2219 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 2220 (plurality opinion); *id.* at 2241 (Kennedy, J., concurring in the judgment); *id.* at 2255 (Stevens, J., dissenting).

Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 126 S. Ct. at 2225 (plurality opinion), that are connected to traditional navigable waters, *id.* at 2226-2227, as well as wetlands with a continuous surface connection to such water bodies, *id.* at 2227.[2] Justice Kennedy interpreted

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[2] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 126 S. Ct. at 2221 n.5.

the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 2236 (Kennedy, J., concurring in the judgment); see *id.* at 2248.[3] In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Ibid.* The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 2265-2266 & n.14 (Stevens, J., dissenting).

3. This case arises out of a civil enforcement action brought by the United States under the CWA. The government alleged that petitioner and others had violated the CWA by discharging fill material into wetlands on an undeveloped 5.8 acre tract in Tomah, Wisconsin, without a permit. 2004 WL 737522, at *1-*4. With respect to the government's claim against petitioner, the district court entered summary judgment for the United States. *Id.* at *20.

As the district court explained (2004 WL 737522, at *7), the principal contested issue in the case was whether the area into which petitioner had discharged fill material was part of "the waters of the United States" for purposes of the CWA. The district court

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[3] Justice Kennedy explained that wetlands "possess the requisite nexus" to traditional navigable waters "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" 126 S. Ct. at 2248.

first examined the physical characteristics of the area where the discharge had occurred and concluded that it fell within the regulatory definition of "wetlands." *Id.* at *7-*10; see 33 C.F.R. 328.3(b). The court further determined that the wetlands were "adjacent"—defined by the regulations to mean "bordering, contiguous, or neighboring," see 33 C.F.R. 328.3(c)—to tributaries of traditional navigable waters. 2004 WL 737522, at *10-*17. In light of the hydrologic connection between the wetlands and traditional navigable waters, the district court agreed with the government that petitioner's discharge was covered by the Act. See *id.* at *16, *20. Petitioner was assessed a civil penalty of $55,000. See 412 F.3d at 805.[4]

4. The court of appeals affirmed. 412 F.3d 804 (2005). The court held that the wetlands at issue here are part of the "waters of the United States" as that term is defined in the Corps and EPA regulations implementing the CWA. *Id.* at 805-806. The court further held that the regulations reflect a permissible construction of the Act and that the statute, so construed, is a

[4] After the district court issued its order granting summary judgment for the government, petitioner and the other defendants entered into a stipulation with the government. See Appellant's C.A. App. Tab 2 (Dist. Ct. Docket No. 157). Petitioner and its co-defendants agreed to restore the wetlands and, after completion of restoration, not to fill or disturb any portion of the site again, except as approved by the Corps. See *id.* at 1-6. Pursuant to the stipulation and order, petitioner reserved the right to appeal on the question of CWA coverage with respect to the district court's imposition of a civil penalty and costs. See *id.* at 6. Petitioner expressly waived any right to appeal "relating to the restoration of the Site and the injunction against future Clean Water Act violations issued by the Court." *Id.* at 6-7. A consent decree entered by the district court the same day finally resolved all issues between the United States and the other defendants. See Appellant's C.A. App. Tab 3 (Dist. Ct. Docket No. 158).

valid exercise of congressional power under the Commerce Clause. *Id.* at 806-808.

5. In November 2005, petitioner filed a petition for a writ of certiorari (No. 05-623). In June 2006, this Court issued its decision in *Rapanos*. The Court subsequently granted the petition for a writ of certiorari in No. 05-623, vacated the judgment of the court of appeals, and remanded the case to the court of appeals for further consideration in light of *Rapanos*. 126 S. Ct. 2964.

6. The court of appeals in turn remanded the case to the district court for further proceedings in light of *Rapanos*. Pet. App. A1-A4. The court of appeals stated that "Justice Kennedy's proposed standard * * * must govern the further stages of this litigation." *Id.* at A4. The court observed that

> any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in *most* cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the *Rapanos* plurality).

Ibid. The court recognized, however, that "a rare case" may occasionally arise in which Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1 (the four dissenting Justices plus the members of the *Rapanos* plurality)," *ibid.*, and it did not specify what it regarded as the proper disposition of such a case.

The United States sought amendment of the court of appeals' opinion to clarify that the CWA term "waters of the United States" encompasses all wetlands that satisfy either the *Rapanos* plurality's standard or that of Justice Kennedy. Petitioner filed a petition for rehearing

en banc, arguing that the CWA encompasses only those wetlands that meet the *Rapanos* plurality's standard. The court of appeals denied the United States' request for clarification and petitioner's request for rehearing. Pet. App. B1-B2.

ARGUMENT

Petitioner seeks review of the court of appeals' holding that, if the wetlands at issue in this case are found to satisfy the "significant nexus" standard articulated in Justice Kennedy's concurring opinion in *Rapanos*, 126 S. Ct. at 2241, those wetlands are subject to federal regulatory jurisdiction under the CWA. That holding is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. As a threshold matter, this Court's review is unwarranted because of the interlocutory posture of the case. The court of appeals did not apply this Court's decision in *Rapanos* to the wetlands at issue here, but instead remanded the case to allow the district court to perform that task in the first instance. Although petitioner contends that the court of appeals' remand order announced an erroneous legal standard, this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for a writ of certiorari); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"). That course is particularly appropriate here because *no* court has yet applied

either of the legal standards set forth in *Rapanos* to the wetlands at issue in this case.

2. Petitioner contends (Pet. 4-5) that, under this Court's decision in *Marks* v. *United States*, 430 U.S. 188 (1977), the plurality opinion in *Rapanos* established the controlling legal standard for determining whether the CWA encompasses particular wetlands. Petitioner argues (Pet. 4-5) that, if a wetland satisfies Justice Kennedy's "significant nexus" standard but not that of the *Rapanos* plurality, it is not covered by the CWA. That argument lacks merit.

a. Under a proper understanding of *Rapanos*, the Corps and EPA may continue to exercise regulatory jurisdiction over any wetland that satisfies *either* the standard for CWA coverage adopted by the *Rapanos* plurality *or* the standard set forth in Justice Kennedy's concurrence. That is so because the four dissenting Justices in *Rapanos* stated explicitly that they would sustain the exercise of federal regulatory jurisdiction under the CWA whenever either of those standards is satisfied. See 126 S. Ct. at 2265-2266 & n.14 (Stevens, J., dissenting). Thus, in all such cases, the agencies' exercise of regulatory jurisdiction would be consistent with the views of a majority of this Court's Members. See U.S. EPA & Dep't of the Army, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, at 3 & nn. 14-15 (June 5, 2007) <http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf>

In *Marks*, this Court stated that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as the position taken by those Members who concurred in the judgment[] on

the narrowest grounds.'" 430 U.S. at 193 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976)). Taken in isolation, the *Marks* Court's reference to "those Members who concurred in the judgment[]" might suggest that lower courts, in determining the precedential effect of a fractured decision of this Court, should ignore the views of dissenting Justices. This Court has subsequently recognized, however, that in some cases the *Marks* test is "more easily stated than applied to the various opinions supporting the result," *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols* v. *United States*, 511 U.S. 738, 745 (1994)), and has acknowledged that "[i]t does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility'" in every case, *ibid.* (quoting *Nichols*, 511 U.S. at 745-746).

In some fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment may be the only controlling principle on which a majority of the Court's Members agree. In that situation, application of the rule announced in *Marks* provides a sensible approach to determining the controlling legal principles of the case. But in *Rapanos*, as in some other instances, no opinion for the Court exists and neither the plurality nor the concurring opinion is in any sense a "lesser-included" version of the other.

In those circumstances, the principles on which a majority of the Court agreed may be illuminated only by consideration of the dissenting Justices' views. The dissenting opinions, by emphasizing controlling legal principles on which a majority of the Court agrees, may thereby contribute to an understanding of the law created by the case. And once those principles have been identified, sound legal and practical reasons justify a rule that a lower federal court should adhere to the view

of the law that a majority of this Court has unambiguously embraced. See *Waters* v. *Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement among the plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under *Marks*, as the holding of the Court); cf. *Abdul-Kabir* v. *Quarterman*, 127 S. Ct. 1654, 1667, 1668-1669 n.15, 1671 (2007) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594, 2607 (2006) (same); *Alexander* v. *Sandoval*, 532 U.S. 275, 281-282 (2001) (same); *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 285 (1995) (same).

Consideration of the dissenting Justices' views is consistent with the underlying purpose of the specific rule announced in *Marks*, because it enables lower courts to discern the governing rule of law that emerges from a fractured decision of the Court. Cf. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (noting the need to look to *Marks* in view of the absence of an opinion commanding a majority of the Court). The application of that approach here clearly supports finding the existence of federal regulatory jurisdiction whenever the legal standard of the plurality or of Justice Kennedy's concurrence is satisfied, since a majority of the Court's Members would find jurisdiction in either of those instances. See *id.* at 2265 (Stevens, J., dissenting).

b. Petitioner contends (Pet. 3-5, 8-13) that the lower courts must apply solely the standard set forth by the *Rapanos* plurality, not that of Justice Kennedy, in determining whether particular wetlands fall within the CWA's coverage. In petitioner's view, *Marks* requires that the *Rapanos* plurality opinion be treated as the

holding of the Court because the plurality opinion states the "narrowest grounds" for the Court's decision. Pet. 4 (quoting *Marks*, 430 U.S. at 193). That argument lacks merit.

In *Rapanos*, five Justices agreed that the judgments of the Sixth Circuit in the consolidated cases under review should be vacated and the cases remanded for further proceedings. See 126 S. Ct. at 2235 (plurality opinion); *id.* at 2252 (Kennedy, J., concurring in the judgment). The plurality concluded that a remand was necessary because the court of appeals had not determined, and the existing record provided an inadequate basis for deciding, whether the tributaries at issue "contain[ed] a relatively permanent flow" or whether the pertinent wetlands "possess[ed] a continuous surface connection" to those tributaries. *Id.* at 2235. Justice Kennedy found a remand to be appropriate because neither the Corps nor the lower courts in the consolidated cases had addressed the question "whether the specific wetlands at issue possess a significant nexus with [traditional] navigable waters." *Id.* at 2252; see *id.* at 2250-2252.

Because neither of those grounds for decision is inherently narrower than the other, it is logically impossible to identify a consensus "narrowest" position among the views of the Justices who concurred in the judgment. Petitioner is wrong in contending (Pet. 10) that, as a categorical matter, "when the [*Rapanos*] plurality standard is applied to find federal jurisdiction, the result would have the support of all nine Justices." Justice Kennedy observed that the plurality's test "covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)," 126 S. Ct. at 2246, and he indicated that at least some such wetlands would not fall within the CWA's coverage as he

construed the statute, see *id.* at 2246, 2249. As the court of appeals correctly recognized in the remand order at issue here, that aspect of the *Rapanos* concurrence suggests that, in "a rare case," Justice Kennedy "would vote against federal authority only to be outvoted 8-to-1." Pet. App. A4; see *United States* v. *Johnson*, 467 F.3d 56, 64 (1st Cir. 2006) (explaining that "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction" because there are certain cases in which "the plurality's jurisdictional test would be satisfied, but Justice Kennedy's balancing of interests might militate against finding a significant nexus").[5]

Moreover, even if all wetlands satisfying the *Rapanos* plurality's standard for CWA coverage would

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[5] In *Johnson*, the court of appeals explained that, for purposes of *Marks* analysis, one ground of decision can reliably be identified as "narrower" than another only when the first rationale is a "logical subset" of the second. 467 F.3d at 63 (quoting *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), cert. denied, 505 U.S. 1229 (1992)). The court further explained that "[t]his understanding of 'narrowest grounds' as used in *Marks* does not translate easily to the present situation" because "[t]he cases in which Justice Kennedy would limit federal jurisdiction are not a subset of the cases in which the plurality would limit jurisdiction." *Id.* at 64. The court of appeals also observed that, "[s]ince *Marks*, several members of [this] Court have indicated that whenever a decision is fragmented such that no single opinion has the support of five Justices, lower courts should examine the plurality, concurring and dissenting opinions to extract the principles that a majority has embraced." *Id.* at 65. The First Circuit concluded that "[t]he federal government can establish jurisdiction over [wetlands] if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*." *Id.* at 66. The court explained that, because the four *Rapanos* dissenters would find federal regulatory jurisdiction in any case where either of those standards is satisfied, this approach "provides a simple and pragmatic way to assess what grounds would command a majority of the Court." *Id.* at 64.

also satisfy Justice Kennedy's "significant nexus" standard, petitioner would still be wrong in contending that the plurality's approach stated the "narrowest grounds" for decision within the meaning of the *Marks* rule. To the contrary, Justice Kennedy's concurrence would then state the "narrowest grounds" because it would impose the least restrictive limits on the exercise of regulatory authority by the Corps and EPA, and because it would reflect the narrowest disagreement with the judgments under review in *Rapanos* and with the approach advocated by the four dissenters. In *Marks*, the Court explained that the narrowest grounds for decision in *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), were the rationale of the *Memoirs* plurality, which allowed some government regulation of obscene materials, rather than the "broader grounds" urged by Justices Black and Douglas, who would have held "that the First Amendment provides an absolute shield against governmental action aimed at suppressing obscenity." *Marks*, 430 U.S. at 193. The Court in *Marks* thus treated the rationale that imposed less sweeping constitutional constraints on the government's authority to regulate obscenity (and that reflected the narrowest disagreement with the judgment under review and with the approaches advocated by the dissenters) as the narrower grounds for the decision in *Memoirs*. Petitioner's contrary suggestion—that the plurality opinion in *Rapanos* must be deemed the narrowest grounds for the *judgment* if it adopted the narrowest view of federal regulatory *jurisdiction* under the CWA—is thus inconsistent with both the logic and the square holding of *Marks* itself.

c. Petitioner contends (Pet. 4, 10-14) that the circuits are divided with respect to the standard to be used in

identifying "the waters of the United States" in light of the various opinions in *Rapanos*. Contrary to petitioner's contention, the Seventh Circuit's decision in this case does not squarely conflict with any decision of another court of appeals. In any event, the other courts of appeals that have considered the issue have rejected the proposition, advanced by petitioner in this case, that wetlands satisfying Justice Kennedy's legal standard but not that of the *Rapanos* plurality fall outside the CWA's coverage.

Petitioner asserts (Pet. 13) that the First Circuit in *Johnson* "rejected the Seventh Circuit's conclusion in this case that under *Marks* Justice Kennedy's lone concurrence is controlling." As petitioner acknowledges (*ibid.*), however, the First Circuit in *Johnson* gave full effect to Justice Kennedy's "lone concurrence," holding that the "federal government can establish jurisdiction over [wetlands] if it can meet *either* the plurality's *or* Justice Kennedy's standard as laid out in *Rapanos*." 467 F.3d at 66 (emphasis added); see note 5, *supra*. The decision in *Johnson* provides no support for petitioner's contention that the CWA's coverage is limited to wetlands that satisfy the standard advocated by the *Rapanos* plurality. Nor is there any conflict between the First and Seventh Circuits with respect to the CWA's coverage of wetlands that satisfy Justice Kennedy's "significant nexus" standard. And while the Seventh Circuit (unlike the First Circuit) did not expressly hold that CWA jurisdiction would exist in the "rare case" (Pet. App. A4) in which the plurality's standard would be satisfied but Justice Kennedy's would not, the court did not foreclose that result either, and accordingly there is no conflict.

In *Northern California River Watch* v. *City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006), the court stated that Justice Kennedy's concurring opinion in *Rapanos* "provides the controlling rule of law." As in the instant case, however, the court did not specifically discuss the proper resolution of a coverage dispute involving wetlands that satisfy the *Rapanos* plurality's standard but not Justice Kennedy's. Analysis of that question was unnecessary because the Ninth Circuit held that Justice Kennedy's standard *was* satisfied and that the wetlands at issue therefore were covered by the CWA. See *id.* at 1030-1031. A petition for rehearing with respect to the proper application of *Rapanos* is currently pending before the court of appeals in that case, so it is possible that the Ninth Circuit will revise its analysis. The court's opinion provides no support, however, for petitioner's contention that the *Rapanos* plurality opinion states the sole controlling rule of law.

Thus, the First, Seventh, and Ninth Circuits all agree that wetlands satisfying Justice Kennedy's "significant nexus" standard are covered by the CWA. The First Circuit in *Johnson* held that the CWA *also* encompasses wetlands that satisfy the *Rapanos* plurality's standard but not that of Justice Kennedy. The court in *Johnson* explained that, if the CWA term "waters of the United States" were read to exclude such wetlands, "there would be a bizarre outcome—the court would find no federal jurisdiction even though eight Justices (the four members of the plurality and the four dissenters) would all agree that federal authority should extend to such a situation." 467 F.3d at 64. No other court of appeals has specifically addressed the proper treatment under *Rapanos* of wetlands that satisfy the plurality's standard but not that of Justice Kennedy. But even if a

circuit conflict existed with respect to the CWA's application to that category of wetlands, the instant case would be an unsuitable vehicle to resolve the question. That is so both because it is currently unclear whether petitioner's own wetlands fall within that category (see pp. 8-9, *supra*), and because petitioner *agrees* with the United States that wetlands in that category are covered by the CWA.

4. Petitioner contends (Pet. 16) that the "significant nexus" standard in Justice Kennedy's opinion "raises due process concerns" because it provides insufficient guidance to regulated parties. Under settled legal principles, however, petitioner can prevail in such a challenge only by showing that the CWA term "waters of the United States," if construed in accordance with Justice Kennedy's "significant nexus" standard, would be unconstitutionally vague as applied to petitioner's *own* conduct. See, *e.g.*, *United States* v. *Powell*, 423 U.S. 87, 92-93 (1975); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973). Although petitioner asserts (Pet. 19) that the standard articulated in Justice Kennedy's concurrence may "result in inconsistent and unpredictable applications" in future cases, petitioner makes no effort to demonstrate that the "significant nexus" standard is impermissibly vague as applied to the circumstances of this case. In any event, because no court has yet applied the "significant nexus" standard to the wetlands at issue here, this Court's consideration of petitioner's due process claim would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2007

FILED
JUN 15 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1331

In the

Supreme Court of the United States

GERKE EXCAVATING, INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In this case, the Seventh Circuit held that Justice Kennedy's jurisdictional test for wetland regulation is controlling under *Rapanos v. United States*, 126 S. Ct. 2208 (2006). That decision had the effect of prohibiting the Army Corps of Engineers from relying on the plurality's jurisdictional test. The government's opposition to this petition is, therefore, curious in light of the fact that the government has consistently maintained throughout this litigation that a proper interpretation of this Court's precedent would allow the exercise of federal jurisdiction based on either the Kennedy test or the plurality test. In fact, the government sought a rehearing of the Seventh Circuit decision in this case asking the court to adopt such a standard and recently the Army Corps of Engineers and the Environmental Protection Agency issued *Rapanos* implementing guidelines authorizing federal regulation of wetlands based on either jurisdictional test. *See* http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf (last visited June 13, 2007).

ARGUMENT

The question before this Court is not simply whether the wetlands Gerke filled are jurisdictional under the Clean Water Act, as the government claims. Rather, this Court is called on to act in its primary role as arbiter of the law and resolve a clear and substantial circuit court conflict as to the meaning of this Court's landmark *Rapanos* decision. This conflict requires the Court to decide whether the Army Corps of Engineers may be prohibited from relying on the plurality opinion in *Rapanos* as the Seventh Circuit held in this case, or whether the Corps could choose to rely on the plurality opinion as the First Circuit held in *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006). The answer to that question turns on which of the opinions in this Court's split decision is controlling—the four Justice plurality or Justice Kennedy's lone concurrence.

The only rule expressly sanctioned by this Court to interpret its split decisions is found in *Marks v. United States*, 430 U.S. 188 (1977). But the government argues that *Marks* is unworkable as applied to *Rapanos* and that this Court should adopt a new rule for interpreting such decisions. Remarkably, while the government argues *Marks* is unworkable, it opposes a resolution of that question by the Court in this case. Rather than support an effort to settle the law, the government actively seeks to maintain the status quo whereby the lower courts are split on both the application of *Marks* and the enforcement of *Rapanos*.

In *Marks*, this Court stated: "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the Judgment[] on the narrowest grounds.'" 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). In contrast to *Marks*, the government contends that the holding of the Court should be viewed as the position taken by *any* majority on the Court, even if that majority includes the dissenting Justices who did not concur in the judgment. But if this Court is to consider the government's proposal to adopt a new interpretive rule, it should do so in the context of a particular case. Therefore, the government's

opposition provides an independent reason for this Court to grant review in this case.[1]

Moreover, the government is wrong. *Rapanos* is a classic *Marks* case. In its opposition, the government acknowledged that the "narrowest grounds" is the concurring opinion that is the logical subset of another opinion concurring in the judgment. Still, the government asserts that the plurality opinion in *Rapanos* is not "in any sense a 'lesser-included' version" of the Kennedy opinion. Opposition at 10. But this is belied by the dissent's observation (with which the government agrees) that it would be "an unlikely event that the plurality's test is met but Justice Kennedy's is not." *Rapanos*, 126 S. Ct. at 2265 n.14. This statement can only be true if the plurality test is a logical subset of the Kennedy test.

According to legal scholars, the "narrowest grounds" standard is met under *Marks* when the "Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule." Ken Kimura, Note, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593, 1603-1604 (1992). "From the text of the alternative concurring opinions, it is possible to determine that if all of the Justices apply the narrower rule, the outcome would have been the same." *Id.* This is certainly true in *Rapanos*. Any wetland that abuts and is indistinguishable from a river, lake, or stream, connected to a navigable-in-fact waterway, as required by the

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[1] The government contends that this case is untimely because the trial court has not yet applied the circuit's legal standard to the facts in the case. But this contention is without merit as the issue raised is purely legal and no additional litigation will benefit the Court. And, it would impose a hardship on Gerke to have to litigate this case once again in trial court and through the appeals process only to return to this Court to resolve an existing circuit split. *See National Park Hospitality Association v. Department of Interior*, 538 U.S. 803, 808 (2003) (citing *Abbott Labs v. Gardner*, 387 U.S. 136, 149 (1967).

plurality to establish federal jurisdiction, will necessarily satisfy Justice Kennedy's broad and subjective "significant nexus" test.[2] Thus, whenever jurisdiction is established under the plurality test, all five Justices concurring in the Judgment would support the outcome—the four Justices in the plurality plus Justice Kennedy. In fact, even the four Justices in the dissent would support the outcome: "all four Justices who have joined this [dissenting] opinion would uphold the Corps' jurisdiction . . . in all . . . cases in which either the plurality's or Justice Kennedy's test is satisfied." *Rapanos*, 126 S. Ct. at 2265 (Stevens, J., dissenting). Therefore, the plurality test is controlling under *Marks*, not because it is more restrictive of federal power, but because it is clearly a logical subset of Justice Kennedy's concurring opinion.

Nevertheless, the government claims that under *Marks* the "narrowest grounds" must be that position which "would impose the least restrictive limits on the exercise of regulatory authority;" that is, Justice Kennedy's test. Opposition at 14. This is the same interpretation advanced by the Seventh Circuit in this case and which the First Circuit denounced in *Johnson*

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[2] The government claims that the plurality approach would reach wetlands beyond the "significant nexus" test based on Justice Kennedy's suggestion that the plurality test "covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)." *Rapanos*, 126 S. Ct. at 2246. But this is a mischaracterization of the plurality position. The plurality determined the Clean Water Act required limiting federal authority to those "relatively permanent, standing or continuously flowing bodies of water" traditionally recognized as "streams[,] . . . oceans, rivers [and] lakes" that are connected to traditional (or navigable-in-fact) waters and only those wetlands abutting these water bodies such that the wetland and the covered water are "indistinguishable." *Id.* at 2225, 2234. In contrast, the Kennedy test places no limits on physical proximity to navigable-in-fact waters and does not even require a hydrological connection to any tributary to a navigable-in-fact water.

thereby creating a conflict necessitating resolution by this Court.

As noted in the petition, the First Circuit in *Johnson* found it inexplicable that the Seventh Circuit in this case equated "narrowest grounds" with the opinion "least restrictive of federal authority." *Johnson*, 467 F.3d at 61. Although the cases on which *Marks* relied involved situations in which the "narrowest grounds" was the least restrictive of federal jurisdiction, the *Johnson* court observed that this was mere coincidence and that it "does not necessarily mean that the Supreme Court in *Marks* equated 'narrowest grounds' of decision in a case with fragmented decisions to the grounds least restrictive of the assertion of federal authority." *Id.* at 63. "Such an equation," the court stated, "leaves unanswered the question of how one would determine which opinion is controlling in a case where the government is not a party." *Id.* Given the constitutional issue raised, the court found it "just as plausible to conclude that the narrowest ground of decision in *Rapanos* is the ground most restrictive of government authority (the position of the plurality)," because, the court concluded, "that ground avoids the constitutional issue of how far Congress can go in asserting jurisdiction under the Commerce Clause." *Id.* Thus, the First Circuit expressly rejected the Seventh Circuit's application of *Marks* to the *Rapanos* decision and held that federal jurisdiction could be based on either the plurality test or the Kennedy test. A clearer conflict between two circuits could not be established.

But even if *Marks* did not apply to *Rapanos*, the government's proposed rule would not provide a solution to the problem of determining the controlling opinion in that case. According to the government, a lower court only needs to find five Justices who agree on a standard to determine the controlling rationale of a split opinion. Opposition at 10-11. But this is no help because in *Rapanos*, five or more Justices would uphold federal jurisdiction under either the plurality test

or the Kennedy test. When the Kennedy test is met, five Justices would support the outcome—Justice Kennedy and the four dissenters. When the plurality test is met, all nine Justices would support the outcome—the four Justices in the plurality, the four Justices in the dissent, and Justice Kennedy. Why shouldn't the outcome that has the support of nine Justices take precedence over the outcome that has the support of only five Justices? Obviously, relying on a majority view, as the government advocates, makes no sense when, as in *Rapanos*, there is more than one majority view.

Consequently, there is a real and substantial conflict between the Seventh Circuit decision in this case and the First Circuit decision in *Johnson* as to both *Rapanos* and *Marks*. Whereas the Seventh Circuit held that federal jurisdiction can only be established under the Kennedy "significant nexus" test, the First Circuit held that federal jurisdiction could be established under either the plurality test or the Kennedy test. And, whereas the Seventh Circuit held that *Marks* applied to *Rapanos* but the "narrowest grounds" is the position that is least restrictive of federal authority, the First Circuit held that *Marks* did not apply to *Rapanos* and that the "narrowest grounds" could just as easily mean the position that is most restrictive of federal authority.

CONCLUSION

The Seventh Circuit decision in this case directly conflicts with a decision of the First Circuit and prohibits the Corps of Engineers from relying on the plurality opinion in *Rapanos* that, when applied to find federal jurisdiction over inland wetlands, would have the support of all nine Justices on this Court. Additionally, the circuits are split on the application of *Marks*. These conflicts require resolution by this Court. Inaction will result in continuing uncertainty as to Clean Water Act jurisdiction and undermine the Constitution's safeguards

against arbitrary enforcement of the law. Therefore, the writ of certiorari should be granted.

DATED: June, 2007.

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this *amicus curiae* brief supporting Petitioner.[1] NAHB represents over 235,000 builder and associate members throughout the United States, including individuals and firms that construct and supply single-family homes, as well as apartment, condominium, multi-family, commercial and industrial builders, land developers and remodelers. Its members are frequently subject to regulation under the Clean Water Act ("CWA"). As a result, NAHB has developed comprehensive familiarity with the CWA's permitting requirements, provides compliance advice to its members, and has witnessed numerous situations where federal regulators have exercised authority beyond the CWA's limits.

NAHB is a petitioner in a CWA case pending before the Court, *NAHB v. Defenders of Wildlife,* No. 06-340 (consolidated with *EPA v. Defenders of Wildlife,* No. 06-549). It has also appeared as *amicus curiae* or "of counsel" in a number of cases involving landowners who have been aggrieved by over-zealous regulation under the CWA and other statutes and programs.[2]

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[1] Letters of consent are on file with the Clerk. Pursuant to Rule 37.6 of this Court, NAHB states that its counsel authored this brief. The brief was not written in whole or part by counsel for a party, and no one other than *amicus* made a monetary contribution to its preparation.

[2] These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer &*

SUMMARY OF ARGUMENT

- ***Which Test from Rapanos Controls:*** The 4-1-4 decision in *Rapanos v. United States,* 126 S.Ct 2208 (2006), failed to provide a unifying theory to determine the scope of "navigable waters" under the CWA. A pronounced split among the circuit courts of appeals has thus developed on the "correct" test for ascertaining the CWA's scope. Millions of acres of property will remain in regulatory limbo until a majority of this Court announces the guiding test for "navigable waters" jurisdiction.

Frates v. Yolo County, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003); *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Protection*, 126 S.Ct. 1843 (2006); and *Rapanos v. United States*, 126 S.Ct. 2208 (2006).

- ***Points of Consensus:*** In *Rapanos,* the plurality opinion authored by Justice Scalia and Justice Kennedy's separate concurrence in the judgment share important points of commonality. The Court should grant the petition to articulate these areas of consensus, and thereby provide tremendous guidance to the lower courts, the agencies implementing the CWA, and the regulated community as they interpret the key provision defining "navigable waters."

ARGUMENT

I. THE LOWER COURTS NEED GUIDANCE ON WHICH TEST FROM *RAPANOS* CONTROLS QUESTIONS OF CWA JURISDICTION.

Petitioners set forth (Pet. 9-15) the lower court conflict on whether and how the principles from *Marks v. United States,* 430 U.S. 188 (1977), apply to the Justices' varying *Rapanos* opinions. The oft-cited "rule" from *Marks* is:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who *concurred in the judgments on the narrowest grounds.*'

Marks, 430 U.S. at 193 (emphasis added) (citations omitted). The *Marks* formulation has not been a favorite of this Court. "This test is more easily stated than applied," and it is "not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 745-46 (1994).

In all of *Rapanos*, there is but a single, off-handed, and oblique reference to *Marks*. It is hidden in Chief Justice Roberts's concurrence:

> It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. See *Grutter v. Bollinger*, 539 U.S. 306, 325, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (discussing *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)).

Rapanos, 126 S.Ct. at 2236 (Roberts, C.J., concurring). The Chief Justice declined to rely on *Marks* as direct authority, but simply noted the case as "discuss[ed]" in *Grutter*.[3]

No opinion in *Rapanos* provides even the barest analysis of *Marks*, or how it may be used to make sense of the Justices' varying tests for CWA jurisdiction. Nonetheless, several circuit and district courts (including the court of appeals below) have relied upon the "narrowest grounds" language to divine some holding amidst the 4-1-4 chaos on "navigable waters." See *United States v. Gerke*

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[3] In *Grutter*, the Court questioned whether Justice Powell's lone concurrence in the 4-1-4 *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), decision was controlling under *Marks*. It found that it was not necessary to answer that question as a majority of the Court ultimately endorsed Justice Powell's view. *Grutter*, 539 U.S. at 325. *Grutter* does not extol *Marks* as a model of clarity, but rather cites *Nichols*, *supra* p. 3, to recognize that *Marks* "has so obviously baffled and divided the lower courts ...." *Id.* at 325 (citing *Nichols*, 511 U.S. at 745-46).

Excavating, Inc., 464 F.3d 723, 724 (7th Cir. 2006); *No. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006); *United States v. Johnson*, 467 F.3d 56, 60-65 (1st Cir. 2006); *United States v. Fabian*, 2007 WL 1035078 at *10 (N.D. Ind. March 29, 2007); *Simsbury-Avon Preservation Soc'y v. Metacon Gun Club*, 472 F.Supp. 2d 219, 225-27 (D. Conn. 2007), [appeal filed] No. 04-00803 (2d Cir. March 2, 2007); *United States v. Evans*, 2006 WL 2221629 at *19 (M.D. Fla. Aug. 2, 2006). Absent instruction from this Court, it is no wonder that the lower courts have rapidly devolved into conflict on how *Marks* should be applied—or indeed, whether the *Marks* test is at all appropriate—to determine the scope of "navigable waters" post-*Rapanos*.

A. Seventh and Ninth Circuits: Justice Kennedy's "Significant Nexus" Test is the Sole Controlling Standard.

The court of appeals below and the Ninth Circuit have interpreted the "narrowest grounds" to mean *only* the "significant nexus" test of Justice Kennedy's concurrence. See *Gerke Excavating*, 464 F.3d at 724-25 ("This test is narrower (so far as reigning in federal authority is concerned) than the plurality's in most cases ...."); *Healdsburg*, 457 F.3d at 1029 ("Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment and, therefore, provides the controlling rule of law"). Assuming for the sake of argument that "the narrowest grounds" from *Rapanos* means that opinion "least restrictive of federal authority," *Johnson*, 467 F.3d at

61,[4] it is not clear that Justice Kennedy's "significant nexus" test even fits that bill.

For example, on another occasion the Ninth Circuit decided that the CWA did not cover a pond because "Justice Kennedy's controlling concurrence explained that *only wetlands* with a significant nexus to a navigable-in-fact waterway are covered by the Act." *San Francisco Baykeeper v. Cargill Salt Division,* 481 F.3d 700, 707 (9th Cir. 2007) (emphasis supplied). The Ninth Circuit said: "[W]e emphasize that [the significant nexus] standard was for wetlands ...." *Id.* at 708. Thus, *Baykeeper* interprets significant nexus to *not* reach ponds, pools, creeks, or other non-wetland features.[5] In contrast, the *Rapanos* plurality

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[4] It is just as plausible to conclude that the "narrowest grounds" are those least restrictive on permissible, private land-uses. See *Johnson,* 467 F.3d at 63 ("one might sensibly conclude ... that the 'narrowest grounds' are simply understood as the 'less far-reaching common ground.' *Johnson v. Bd. of Regents of the Univ. of Ga.,* 263 F.3d 1234, 1247 (11th Cir. 2001) ....").

[5] *Baykeeper* correctly placed bounds around "significant nexus" as only allowing coverage *vis-à-vis* wetlands, considering that the primary basis for Justice Kennedy's theory was *United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985). See, *e.g., Rapanos,* 126 S.Ct. at 2248 (Kennedy, J., concurring) (relying on *Riverside Bayview,* and stating: "As applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone"). Wetlands were the sole aquatic feature at issue in *Riverside Bayview,* where the Court afforded deference to the Corps's interpretation of "adjacent wetlands" in light of a thorough legislative and rulemaking record containing detailed findings on wetlands' unique ecological importance. *Riverside*

could consider such features as statutory "navigable waters" if they constitute "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features ....' " *Rapanos,* 126 S.Ct. at 2225 (Scalia, J.). Accordingly, the plurality might deem a feature like Walden Pond as within the CWA, while the "significant nexus" test would not stretch so far—because Walden Pond is *not* a wetland. From this perspective, the significant nexus test is *more* restrictive of Corps jurisdiction; more *types* of features escape CWA coverage under Justice Kennedy's approach compared to the breadth of Justice Scalia's analysis, which reaches non-wetlands. Hence, following *Baykeeper,* the plurality is arguably "the narrowest grounds" of concurrence.

The folly in deeming "significant nexus" a broader assertion of federal jurisdiction compared to the plurality's approach is further evidenced by Justices Scalia's and Kennedy's respective statements on the need for a hydrologic connection to trigger CWA coverage. For the plurality, a wetland is jurisdictional as long as it has "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands...." *Id.* at 2226 (Scalia, J.) However, Justice Kennedy would *not* endorse CWA jurisdiction over a wetland connected by a

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Bayview, 474 U.S. at 132-137. In contrast, ponds were not at issue in *Riverside Bayview.* And, the Corps has not made similar administrative findings in a rulemaking record on the functions that ponds, pools, ditches, or other non-wetland features may serve in the ecosystem. Indeed, this Court has previously determined that certain ponds fell outside the CWA's scope and "exceed[ed] the authority granted to [the Corps] ...." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 174 (2001).

continuous but mere trickle to a traditional navigable water, because such a wetland would lack a "significant nexus." "[B]y saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach." *Id.* at 2246 (Kennedy, J., concurring). Again, Justice Kennedy's approach poses greater incursions on Corps authority, so the plurality would provide "the narrowest grounds" of concurrence from *Rapanos—if* those grounds are determined by the least restrictions on federal jurisdiction.

B. First Circuit and Justice Stevens's Dissent: CWA Jurisdiction can be Proved Under *Either* Scalia Plurality *Or* Kennedy Concurrence.

Precisely because of the arbitrariness in discerning which test places greater limits on federal authority, in a 2-1 decision the First Circuit rejected the course of the court of appeals below and the Ninth Circuit in *Healdsburg.* It stated that "one might sensibly conclude ... that the 'narrowest grounds' are simply understood as the 'less far-reaching common ground.' " *Johnson,* 467 F.3d at 63 (citations omitted). As the Petitioner points out (Pet. 12 n. 1), the *Johnson* court thus appeared ready to conclude that the plurality's permanent waterbody/continuous connection approach is a "logical subset" of the Kennedy standard, but it did not go that far. Rather, the First Circuit acknowledged "the shortcomings of the *Marks* formulation in applying *Rapanos*" that would arise if Justice Kennedy's concurrence—joined by no other Member of the Court—provided the controlling standard for determining the CWA's scope. *Id.* at 64. The *Johnson* court thus ruled that

"[t]he federal government can establish jurisdiction over the target sites if it can meet *either the plurality's or Justice Kennedy's standard* as laid out in *Rapanos*." *Id.* at 66 (emphasis added). Justice Stevens suggested this approach in his dissent. *Rapanos*, 126 S.Ct. at 2265 n.14 (Stevens, J., dissenting) ("[I]n these and future cases the United States may elect to prove jurisdiction under either test").

Additionally, a case is pending before the Second Circuit where the district court followed *Johnson*'s either/or approach and concluded that the CWA did not reach certain wetlands at an outdoor rifle range. *Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club,* 472 F. Supp. 2d 219 at 226-27 ("...this Court will consider under both the plurality's and Justice Kennedy's standards the issue of whether the plaintiffs have demonstrated a genuine factual dispute about whether Metacon munitions are being discharged into the waters of the United States"); See also *United States v. Cundiff,* 480 F. Supp. 2d 940 (W.D. Ky. 2007) (adopting the First Circuit's either/or approach).

The circuit conflict is thus resolute. The Seventh and Ninth Circuits have ruled that *only* Justice Kennedy's approach governs "navigable waters" cases. Yet a majority of the First Circuit has ruled that "navigable waters" can be discerned under *either* Justice Scalia's plurality or Justice Kennedy's concurrence. The petition for certiorari should be granted so this Court can resolve the split.

C. Other Authorities: Justice Scalia's Plurality Provides the *Only* Test for CWA Coverage.

Review of other lower court opinions reveals a third point of view: Justice Scalia's plurality is the *sole* determinant for "navigable waters" jurisdiction.

In *Johnson,* Judge Torruella wrote separately to stress his belief that the *Rapanos* plurality provided the lone controlling analysis, because the "significant nexus" test raises serious constitutional concerns:

> I cannot concur that Justice Kennedy's seemingly opaque 'significant nexus' test is a constitutional measure of federal regulatory jurisdiction .... [The plurality's test] strikes a constitutional balance between federal and state regulatory interests, and our nation's interest in clean water and the individual land owner's right to manage their *[sic]* property in accordance with their dreams and aspirations, whether economic or otherwise.

Johnson, 467 F.3d at 66-67 (Torruella, J., concurring in part, dissenting in part).

The first opinion to interpret *Rapanos* likewise complained that Justice Kennedy's concurrence "leaves no guidance on how to implements its vague, subjective centerpiece. That is, exactly what is 'significant' and how is a 'nexus' determined?" *United States v. Chevron Pipe,* 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006). "Because Justice Kennedy failed to elaborate on the 'significant nexus' required," the *Chevron Pipe* court purported to avoid *Rapanos* altogether and "look[ed] to the prior reasoning in this circuit. The Fifth Circuit ... has interpreted 'the waters of the United States' narrowly .... Thus, as a matter of law in this circuit, the connection of

generally dry channels and creek beds will not suffice to create a 'significant nexus' to a navigable water simply because one feeds into the next during the rare times of actual flow." *Id.* In effect, *Chevron Pipe* followed the *Rapanos* plurality—which limits CWA coverage only over "relatively permanent waterbodies"—as the sole jurisdictional test. See also *United States v. Marion L. Kincaid Trust,* 463 F.Supp.2d 680, 696 (E.D. Mich. 2006) (treating the *Rapanos* plurality as controlling without discussing "significant nexus").

To conclude, there are many questions about the CWA's coverage that have generated conflict and confusion in the lower courts, within executive branch agencies implementing the CWA, and among the regulated public. Does the *Marks* formulation apply in this context? If yes, what are the "narrowest grounds of concurrence" among the *Rapanos* Justices? Is it an either/or situation, where CWA jurisdiction can be alternatively supported under the reasoning of the Scalia plurality or the Kennedy concurrence? Or, does Justice Kennedy's approach trump the other *Rapanos* tests? Perhaps Justice Scalia's plurality opinion controls? All this, and *Rapanos* is less than a year old. Things will surely get worse unless this Court rapidly intervenes to lay some ground rules for interpreting *Rapanos.* Respectfully, the petition should be granted.

II. THE COURT SHOULD GRANT CERTIORARI TO EMPHASIZE THE AREAS OF CONSENSUS

AMONG THE *RAPANOS* PLURALITY AND CONCURRING OPINIONS.

Again, to detect a court holding among five Justices, the *Marks* formulation requires an examination of those differing opinions that "concurred in the judgments." *Marks*, 430 U.S. at 193. Any holding from *Rapanos* must therefore be limited to an examination of Justice Scalia's plurality and Justice Kennedy's concurrence—because only those opinions garnered support from five Members who concurred in the judgment by vacating the Sixth Circuit's too-expansive interpretation of the CWA.[6] Justice Stevens's dissent does not factor into this calculus because it did not vacate the Sixth Circuit.[7] With the approaches authored by Justices Scalia and Kennedy thus placed in proper focus, there are important points of consensus that this Court should announce. Illustrative topics of commonality between the plurality and Justice Kennedy's concurrence are as follows:

- **The CWA's scope is not restricted to traditional navigable waters.**

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[6] See *Rapanos*, 126 S.Ct. at 2235 (plurality) ("We vacate the judgments of the Sixth Circuit in both No. 04-1034 *[Rapanos]* and No. 04-1384 *[Carabell]*, and remand both cases for further proceedings"); *id.* at 2252 (Kennedy, J. concurring) ("In these consolidated cases I would vacate the judgments of the Court of Appeals ....")

[7] See *Rapanos*, 126 S.Ct. at 2265 (Stevens, J., dissenting) ("I would affirm the judgments in both cases, and respectfully dissent from the decision of five Members of this Court to vacate and remand").

- Plurality: "The Act's term 'navigable waters' includes something more than traditional navigable waters ...." *Rapanos,* 126 S. Ct. at 2220. The plurality "affirmatively reject[ed]" an interpretation that the CWA "includes only navigable-in-fact waters." *Id.* at 2231.
- Kennedy Concurrence: "Congress' choice of words creates difficulties, for the Act contemplates regulation of certain 'navigable waters" that are not in fact navigable." *Id.* at 2247.

- **The word "navigable," in the phrase "navigable waters," has meaning.**
  - Plurality: "[T]he traditional term 'navigable waters' ... carries *some* of its original substance ...." *Id.* at 2222.
  - Kennedy Concurrence: "[T]he dissent reads a central requirement out [of the CWA]—namely, the requirement that the word 'navigable' in 'navigable waters' be given some importance." *Id.* at 2247. "Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term 'navigable' some meaning, the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 2248.

- **A mere hydrological connection can *not* provide the basis for CWA jurisdiction.**
  - Plurality: Rejecting the federal government's hydrologic connection theory in deciding that the phrase "the waters of the United States" "cannot bear the expansive meaning that the Corps would give it." *Id.* at 2220. "[R]elatively continuous flow

is a *necessary* condition for qualification as a 'water,' not an *adequate* condition." *Id.* at 2223 n.7.

- ➢ Kennedy Concurrence: Criticizing the dissent because it "would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that may eventually flow into traditional navigable waters." *Id.* at 2247. "[M]ere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood." *Id.* at 2251.

- **Hypothetical, speculative, or eventual water flows do *not* support CWA jurisdiction.**
  - ➢ Plurality: "[T]he phrase 'the waters of the United States' includes *only* those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes." *Id.* at 2225 (emphasis supplied). *"[O]nly* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." *Id.* at 2226.
  - ➢ Kennedy Concurrence: "The Corps' theory of jurisdiction in these consolidated cases—adjacency to tributaries, *however remote and insubstantial*—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps' assertion of jurisdiction cannot rest on that case." *Id.* at 2248 (emphasis added). "When ... wetlands' effects on water quality *are speculative or insubstantial,* they

fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* at 2248 (emphasis added). In remanding *Carabell* back to the Sixth Circuit, Justice Kennedy stated that "[t]he conditional language in [the Corps's] assessments—'potential ability,' 'possible flooding'—could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence supporting the Corps' claims ...." *Id.* at 2251. In *Carabell*, "the Corps based its jurisdiction solely on the wetlands' adjacency to the ditch opposite the berm on the property's edge .... *[M]ere adjacency* to a tributary of this sort *is insufficient;* a similar ditch could just as well be located many miles away from any navigable-in-fact water and *carry only insubstantial flow* towards it." *Id.* at 2251-52 (emphasis added).

- **Mere presence of an ordinary high water mark does not render a feature a jurisdictional "tributary," or the wetlands next to such a feature jurisdictional "adjacent wetlands."**
  - Plurality: As set out above, "'the waters of the United States' includes *only* those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features'...." *Id.* at 2225 (emphasis added). And, as to wetlands, *only* those with a "continuous surface connection to bodies that are 'waters of the United States' in their own right ...." *Id.* at 2226 (original emphasis).
  - Kennedy Concurrence: "[T]he Corps deems a water a tributary if it feeds into a traditional navigable water (or tributary thereof) and possesses an *ordinary high-water mark .... This standard* presumably provides a rough measure of the volume

and regularity of flow. ... *[T]he breadth of this standard*—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it—*precludes its adoption as the determinative measure* of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered *by this standard* might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC*." *Id.* at 2248-2249 (emphasis added).

- **CWA jurisdiction is not lost simply because a waterbody is regularly wet during certain seasons and dry during others.**
  - ➢ Plurality: Recognizing that the Los Angeles River would be jurisdictional under the CWA, and stating: "We ... do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day continuously flowing stream postulated by Justice STEVENS' dissent ...." *Id.* at 2221 n.5. "[N]o one contends that federal jurisdiction appears and evaporates along with water in such regularly dry channels." *Id.* at 2221 n.6.
  - ➢ Kennedy Concurrence: "The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river ... Yet it periodically releases water-volumes so powerful and destructive that it has been encased in concrete ... over a length of some 50 miles ...

Though this particular waterway *might satisfy the plurality's test,* it is illustrative of what often-dry watercourses can become when rain waters flow." *Id.* at 2242 (emphasis added).

- **As a general matter "navigable waters" and "point sources" are *not* the same thing, and normally a feature can't be both.**
  - Plurality: The CWA's definitions "conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping." *Id.* at 2223.
  - Kennedy Concurrence: "[E]ven were the statute read [as the plurality does] to require continuity of flow for navigable waters, certain waterbodies *could conceivably* constitute both a point source and a water." *Id.* at 2243 (emphasis added).

Amicus does not offer these points as an exhaustive list of all areas in which Justices Scalia and Kennedy agree. But these examples of consensus are important and, if articulated cohesively by a majority of Justices in a single opinion, would go a long way toward yielding proper and predictable CWA implementation in the field. Otherwise, lower courts are left to hazard guesses on what the Justices have decided and where they might overlap.

III. INSTRUCTION FROM THIS COURT ON *RAPANOS* IS SORELY NEEDED, BECAUSE CONFUSION ABOUT THAT CASE HAS HALTED BASIC FIELD DETERMINATIONS ON CWA JURISDICTION.

Interpreting the phrase "navigable waters" has never been easy. It was not easy in *Riverside Bayview* in 1985, it was not easy in *SWANCC* in 2001, and it was not easy in *Rapanos* in 2006. Indeed, prior to *Rapanos*, Congress held hearings to address the Corps's haphazard implementation of "navigable waters" jurisdiction.[8] The General Accounting Office has also reported rampant regulatory inconsistencies.[9] But in truth, the 4-1-4 *Rapanos* split has made matters worse in the field.

Soon after the Court decided *Rapanos*, on July 5, 2006, Corps headquarters issued a memo to its district offices

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[8] See, e.g., *Agency Implementation of the SWANCC Decision: Hearing Before the H. Subcomm. on Energy Policy, Natural Resources, and Regulatory Aff. of the H. Comm. on Gov't Reform*, 107th Cong. 2 (2002) (statement of Rep. Doug Ose, Chairman, H. Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs) (Corps determinations have "resulted in widely varying interpretations of the scope of jurisdiction," and the "current situation is creating confusion and chaos").

[9] U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 3 (Feb. 2004), *available at* http://www.gao.gov/new.items/d04297.pdf, at 3 ("Districts apply different approaches"); *id.* at 4 (districts need "[t]o provide greater clarity to the regulated community"); *id.* at 22 ("three different district staff" would probably make "three different assessments").

(supplied in Appendix A attached to this brief). In the memo, headquarters admits its confusion about *Rapanos* and therefore instructs its district offices to "delay making CWA jurisdictional determinations for areas beyond the limits of the traditional navigable waters . . . for the next three weeks." (App. 1a-2a.) Furthermore, the memo provides that Corps headquarters would send advice "as soon as possible and in the very near future." The Corps has to date provided no further advice, and the "three week" delay is now almost one year. (App. 1a-2a.)

The Corps's reaction to *Rapanos* has made a difficult regulatory program incomprehensible and unworkable. NAHB frequently hears from its members that field operations have come to a grinding halt and that Corps personnel are not making jurisdictional determinations because the law is unclear. It is commonly reported that Corps districts have not made *any* decisions on "navigable waters" jurisdiction for almost a year, since *Rapanos* was handed-down in June 2006. And no such field decisions are reportedly forthcoming until the Corps headquarters and the Environmental Protection Agency (EPA) provide "guidance" interpreting *Rapanos*.[10] But what can these

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[10] For example, the Corps Wilmington District has explained that while it waits for headquarters guidance it will not issue final jurisdictional determinations "in cases where there are intermittent or ephemeral streams or wetlands adjacent to intermittent, ephemeral or perennial streams." Regulatory Division-U.S. Army Corps of Engineers Wilmington District http://www.saw.usace.army.mil/WETLANDS/index.htm (last visited May 30, 2007). See also Steve Barnett & Michelle Tantalla, *Rapanos: The Feds and Intrastate Waters*, In Re: New Jersey Lawyer, Vol. 16, No. 9, Feb. 26, 2007, *available at* http://www.connellfoley.com/documents/jsb_mtt_njl_rapanos_

agencies realistically do, except read *Rapanos* like tea leaves and conjure some areas of agreement among the Justices? Respectfully, it is the province of *this* Court to explain what *Rapanos* means.

It is time for a course correction. The Court should seize this opportunity to clarify the muddy waters left in the wake of *Rapanos*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

June 4, 2007

Respectfully Submitted,

Duane J. Desiderio
(*Counsel of Record*)
Thomas J. Ward
National Association of Home Builders
Attorneys for Amicus Curiae

2-26-07.pdf (explaining that the Corp and EPA are holding off jurisdictional determinations until the agencies issue guidance); Kris Christen, *Supreme Court Splits on Wetlands Protection*, Water Environment and Technology, Vol. 18, No. 10, Oct. 2006, *available at* http://www.wef.org/ScienceTechnologyResources/Publications/WET/06Oct/06OctoberNews.htm (providing that the Corps has stopped issuing jurisdictional determinations nationally and that a large permit backlog will be created).

APPENDIX A

From: Sudol, Mark F HQ02

Sent: Wednesday, July 05, 2006 10:25 AM

To: CDL-REG-All; CDL-REG-CHIEFS; CDL-REG-MSC; CDL-REG-Ros

Cc: Barnes, Gerald W HQ02; Smith, Chip R HQDA; Wood, Lance D HQ02; Stockdale, Earl H HQ02; 'Schmauder, Craig R Mr OGC'; Dunlop, George S HQDA; Sherman, Rennie H HQ02; Cummings, Ellen M HQ02

Subject: Interim Guidance on the Rapanos and Carabell Supreme Court Decision

Everyone,

The Supreme Court handed down a decision on June 19, 2006, in the Rapanos and Carabell cases. That decision addresses the scope of Clean Water Act (CWA) jurisdiction over certain waters of the United States, including wetlands. I appreciate the difficulty you are facing in trying to keep an on-going program functioning in the face of the present uncertainty. Given the confusion created by the differing opinions that the Supreme Court justices filed in that case, it will take some time for the Corps and the EPA to analyze and reach consensus on what legal guidance is to be derived from the decision. In the near future we intend to issue joint EPA/Army guidance clarifying CWA jurisdiction in light of the Rapanos/Carabell decision.

We anticipate that the Rapanos/Carabell decision will lead the Corps and the EPA to make some changes in how we describe and document the justifications that underlie some of our CWA jurisdictional determinations (JDs). In other words, the tests that we cite and the facts that we document in some of our JD administrative records will probably

change somewhat, to insure that our JDs reflect the Supreme Court's most recent legal tests for asserting CWA jurisdiction. We will try to send you our advice in this regard as soon as possible and in the very near future.

In the meantime, in order to allow the Corps and EPA to prepare and issue substantive guidance, I am recommending that, to the e tent circumstances allow, you delay making CWA jurisdictional determinations for areas beyond the limits of the traditional navigable waters (i.e., outside the "Section 10" waters) for the next three weeks. Even though you should delay making CWA jurisdictional calls in areas outside the traditional navigable waters for the next three weeks, that does not mean that the processing and issuance of CWA permit authorizations in those areas using general permits and standard individual permits should be delayed, as is further explained below.

I also recommend that, until that substantive guidance is circulated, no Corps District or Division Office should announce or implement any change in (1) how we are documenting our jurisdictional determinations, or (2) regarding the areas over which we are asserting CWA jurisdiction, without prior coordination with and concurrence by Headquarters Regulatory Community of Practice and Headquarters Office of the Chief Counsel.

Until Corps Headquarters issues substantive guidance regarding the Rapanos/Carabell decision, Corps personnel should not represent any Corps position on the effect of these decisions on Clean Water Act jurisdiction in court pleadings or in any sort of dealings with outside parties. Therefore, in situations that require taking a position on the scope of "waters of the US" under the Clean Water Act, e.g. briefs or other filings in judicial or administrative

proceedings, you should defer action if possible. We recommend seeking an extension for any briefs due in administrative or judicial cases in the near term. By way of example, the U.S. sought an extension of 60 days for a brief in United States v. Cundiff, Nos. 05-5469 and 05-5905 (6th Cir.) due June 21st. Ongoing work in Clean Water Act cases, such as settlement negotiation meetings or inspections, should continue if that work does not require taking a position on the legal issues of CWA jurisdiction addressed by the Supreme Court's Rapanos/Carabell decision.

Similarly, during the period until we issue substantive guidance on how to implement the Rapanos/Carabell decision, you should not refer any new regulatory enforcement actions to the Department of Justice other than those involving illegal activities in or affecting traditionally navigable (Section 10) waters, or violation of the terms or conditions of Corps permits covering activities in Section 10 waters. If illegal discharges of dredged or fill material in other waters are causing significant, immediate environmental harm and would justify injunctive relief, notify CECC-L (Martin Cohen) and we will determine an appropriate response on a case by case basis.

Regarding the issuance of permit authorizations during the period before we issue substantive guidance on Rapanos/Carabell, all forms of Section 10 and CWA Section 404 permit authorizations for activities proposed to take place in the traditional navigable waters (i.e., the Section 10 waters) should continue to be issued as before, since the Rapanos/Carabell decision does not affect Section 10 of the Rivers and Harbors Act of 1899 at all, and does not affect CWA jurisdiction over any category of Section 10 waters. In waters other than the traditional navigable

(Section 10) waters, where a permit applicant proposes to conduct an activity involving the discharge of dredged or fill material pursuant to any form of CWA general permit authorization (e.g., NWP, regional general permit, SPGP, etc.), the Corps will continue to authorize those activities using applicable general permits, recognizing that such a permit applicant has the right to seek a modification of the terms and conditions or such a general permit authorization at a later time, as explained below.

Regarding applications for standard individual permits under CWA Section 404 covering activities involving the discharge of dredged or fill material outside the limits of the traditional navigable (Section 10) waters, as a general matter we expect that those individual Section 404 permits will continue to be issued as expeditiously as is practicable, to meet the legitimate needs of permit applicants, during the next few weeks while we are preparing substantive "Rapanos/Carabell guidance." The primary exception to that general rule might be for any individual Section 404 permit covering activities outside the traditional navigable waters where permit issuance is feasible during the next few weeks, but where special conditions of the proffered permit would require the permittee to provide compensatory mitigation, and where that permittee might believe that some or all of his activities are now not subject to regulation under CWA Section 404 because of the Rapanos/Carabell decision, and thus that the mitigation requirements of the permit are excessive or unnecessary. In such a circumstance the Corps should inform the permit applicant that he or she has a number of options, as follows: The permit applicant can accept and sign the proffered permit now, with its existing terms and conditions; or the permit applicant can ask for a delay in the issuance of the permit until the Corps District has received substantive

Rapanos/Carabell guidance from Corps Headquarters, so that the amount of required compensatory mitigation can be reevaluated (if appropriate) based on that new guidance.

For Corps CWA Section 404 permit authorizations made during the next few weeks for activities outside the traditional navigable waters pursuant to either a general permit or a standard individual permits, where the permittee later concludes that the terms or conditions of that permit authorization are inappropriate in light of the Rapanos/Carabell decision, that permittee can ask the Corps to modify the terms or conditions of that permit to rectify the matter subsequent to the issuance of the anticipated EPA/Army substantive Rapanos/Carabell guidance.

Corps Headquarters POCs are Mark Sudol and Russ Kaiser (Regulatory COP), Lance Wood (CCE), and, for litigation and enforcement matters, Martin Cohen (CCL).

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under the Clean Water Act, e.g. briefs or other filings in judicial or administrative proceedings, you should defer action if possible. We recommend seeking an extension for any briefs due in administrative or judicial cases in the near term. By way of example, the U.S. sought an extension of 60 days for a brief in United States v. Cundiff, Nos. 05-5469 and 05-5905 (6th Cir.) due June 21st. Ongoing work in Clean Water Act cases, such as settlement negotiation meetings or inspections, should continue if that work does not require taking a position on the legal issue presented by the Supreme Court decision.

If you cannot defer action that requires taking a position on the scope of "waters of the U.S.," then call Susmita Dubey in OGC at (202) 564-5577, Tom Charlton at (202) 564-6960 (for civil cases) or J. T. Morgan (for criminal cases) at (202) 564-7684 in OECA. For program implementation issues that may involve taking positions regarding scope of jurisdiction, but do not directly involve ongoing enforcement actions or lawsuits yet are hard to delay, contact Donna Downing regarding the 404 program at (202) 566-1367 and Debora Clovis regarding the 402 program (202) 564-0739.

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